

## **MINUTES**

### **MONTANA SENATE 58th LEGISLATURE - REGULAR SESSION**

#### **COMMITTEE ON JUDICIARY**

**Call to Order:** By **CHAIRMAN DUANE GRIMES**, on January 20, 2003 at 10:00 A.M., in Room 172 Capitol.

#### **ROLL CALL**

**Members Present:**

Sen. Duane Grimes, Chairman (R)  
Sen. Dan McGee, Vice Chairman (R)  
Sen. Brent R. Cromley (D)  
Sen. Aubyn Curtiss (R)  
Sen. Jeff Mangan (D)  
Sen. Jerry O'Neil (R)  
Sen. Gerald Pease (D)  
Sen. Gary L. Perry (R)  
Sen. Mike Wheat (D)

**Members Excused:** None.

**Members Absent:** None.

**Staff Present:** Judy Keintz, Committee Secretary  
Valencia Lane, Legislative Branch

**Please Note.** These are summary minutes. Testimony and discussion are paraphrased and condensed.

**Committee Business Summary:**

Hearing & Date Posted: SB 34, 1/15/2003  
Executive Action: SB 116

**EXECUTIVE ACTION ON SB 116**

**CHAIRMAN DUANE GRIMES** explained the Committee took action on SB 116 on the previous Friday, January 17, 2003. The DO PASS motion failed. Without objection, the action was reversed for an indefinite postponement. By mistake it was forwarded to the Senate Floor and read as a DO NOT PASS. It was re-referred back to the Senate Judiciary Committee.

**Motion/Vote:** SEN. DAN MCGEE moved that SB 116 BE INDEFINITELY POSTPONED. Motion carried 8-1 with MANGAN voting no.

**HEARING ON SB 34**

**Sponsor:** SEN. GREG BARKUS, SD 39, KALISPELL

**Proponents:** Tim Reardon, Chief Counsel for the MDOT  
Dan Rice, Transportation Commissioner for District  
3, MDOT  
Nancy Espy, Vice Chair, Transportation Commission  
Cary Hegreberg, Montana Contractors Association  
John Bloomquist, Montana Stockgrowers Association  
Dave Galt, Director of the MDOT

**Opponents:** None

**Opening Statement by Sponsor:**

SEN. GREG BARKUS, SD 39, KALISPELL, introduced SB 34, which had been requested by the Montana Department of Transportation (MDOT). It is necessary for the MDOT to adequately address "necessity" in the need for highway projects. During the process of acquisition, the MDOT runs into problems with acquiring certain right-of-ways. The purpose of SB 34 is to provide a statutory framework to establish a process to expedite court hearings on challenges to MDOT's need to acquire the property. This bill applies only to highway construction and that is why it is being proposed as an amendment to Title 60 in the code. The changes are limited to the circumstances when the Department has been able to acquire a majority of the property needed for a project either by negotiation or separate court proceedings. This process cannot be used by the Department unless it has acquired at least a majority two-thirds of all parcels needed for a project. As written, once the Department has acquired at least two-thirds of the parcels needed, it may ask the court to set a hearing on the question of whether or not the need, or necessity, of a particular parcel is there. Property owners can still have a hearing on MDOT's motion for possession. This bill requires

that the hearing take place within 20 days. After a landowner objects to the Department's request for an order placing it in possession, a ruling by the court must be made within 30 days after such hearing. Currently, the law allows up to six months for such hearings. This time is subject to additional delays by the court. The delay is what causes the problems. Until the Department can certify that it has possession of all property needed for a project, the Federal Highway Program will not authorize the use of the funds for construction. Delays of months can mean loss of a construction season and inflationary increases to the project costs.

Landowners and attorneys are starting to use this objection to possession as a delaying tactic to leverage a higher payment for the property. Due to the urgency of letting projects on time, the Department has been forced to concede higher values as well as certain construction features. As a result, some landowners on the same project, are treated unfairly. Prior to asking for a hearing, the Department must make a deposit to the court for the estimated fair market value of the property. These funds may be withdrawn by the property owner without prejudicing the right to challenge the final amount due. This process affects only the issue of necessity, not value. If the property owner wishes to contest the amount offered for the property, he or she may do so and that portion of the law is unchanged. The request is made by the Department to keep projects on schedule and within budget while providing opportunity for landowners to still have their day in court.

#### **Proponents' Testimony:**

**Tim Reardon, Chief Counsel for the MDOT,** stated that the law of condemnation takes into account two very important constitutional principles: 1) private property cannot be taken without the payment of just compensation for the property and all the damages attended to that taking, and 2) Article II, Section 17, which provides that property may not be taken without due process of law. The right-of-way phase may take 12 to 24 months. Public hearings must be held and there must be at least one year of personal contact with landowners. The property has been appraised and an offer has been made for the acquisition. First the need for the property must be established. Section 60-4-104 statutorily establishes a presumption that when an order of condemnation is issued by the Department, it is presumed to be in the best interests of the public and it has the least private impact. This shifts the burden to the landowner to prove that it is not in the best interest of the public, it is not in the greatest public good, and it does not cause the least private harm.

Since 1985, no necessity hearings have been brought to the Montana Supreme Court. The Department is in a position of being unable to completely certify the acquisition of all the property needed for a given project. There may be 100 parcels on a project but it only takes one or two property owners who refuse to grant possession to stall the project.

This bill creates a process to provide some predictability to in hearings process regarding legitimate disputes in regard to necessity. The law currently provides, that after a summons and complaint is served, within six months the court can be asked for a hearing and this time can be extended or reduced by the court.

Two years ago, on a project in Helena, the Department was unable to set a court hearing for eight months. On the day of the hearing, the landowner and his attorney did not show up. Later that day, they agreed to stipulate possession. They had no witnesses and no intention of putting on a case on the issue of necessity.

Last fall there was a project in eastern Montana in which the Department had acquired 90 parcels leaving five or six parcels for possession. The issue with these particular landowners was they desired larger stock passes than had been designed. This issue is not related to right-of-way. The landowners would give the Department possession if their demands were met. One demand was a difference of several thousand dollars an acre. This was paid. This is a value issue which should be decided in an entirely different process in the condemnation code.

This bill should not affect the caseloads in the court system. Currently, hearings are not occurring due to all the delays involved. The intent of this bill is to balance the process so it works both ways.

**Dan Rice, Transportation Commissioner for District 3, MDOT,** noted that with the necessity of environmental impact statements (EISs), which can take up to five years, when there is a delay in the acquisition of right-of-way, there is a possibility that the EIS may become stale. This may involve the need for a new EIS. The costs associated are significant and the design criteria may change in this length of time.

**Nancy Espy, Vice Chairman of the Transportation Commission,** stated that 99 percent of time the landowners have been waiting for years for the highway construction to take place. A few people are concerned about a pasture being cut in half or the potential of commercial development on their land. She was an observer when claims were being addressed. In one instance, the disagreement was over the size of the cattle pass. In another

instance, the problem was the size and placement of the gate. These matters are very easy to solve and had nothing to do with right-of-way. They all settled on the original price with the understanding that they would receive the extra benefits they needed to be satisfied. She was amazed by the sensitivity and the negotiating process used by the Department. However, certain people will not give up one inch of their land and thereby cause highway construction work to be postponed for years.

**{Tape: 1; Side: B}**

One person they worked with told them his great grandfather had donated land for the highway and he decided he would now like to be compensated for the land.

**Cary Hegreberg, Montana Contractors Association**, rose in support of SB 34. He stated that the Association members watched the highway projects. They have noticed that a project is proposed to be awarded in April and the next thing they know it is on September's letting list. Quite often the reason is the Department has not been able to secure the right-of-way. This bill is a balanced approach to preserving private property rights in Montana while still serving the public interest of making sure the highway construction is completed in an expeditious fashion. If the Department is not able to fully appropriate projects that use our federal funding base, the funding can be lost to other states.

**John Bloomquist, Montana Stockgrowers Association**, relayed that the Commission has contacted the Montana Stockgrowers Association in regard to this bill. They discussed the necessity and the absolute need to preserve the process for the landowners' right to appear and challenge the necessity of the taking. There is definitely a benefit and an opportunity to Montana for the projects. Better highways create greater marketability for agricultural commodities.

**Dave Galt, Director of the MDOT**, stated delivery is a very important issue for them. A project scheduled for the City of Dillon which involved a missed deadline will result in working on Main Street during the Lewis and Clark Expedition. The Department has reviewed their process. Changes have been made to their project management system as well as their internal process. The entire membership of the Montana Stockgrowers Association was surveyed which resulted in several hundred responses from landowners who had worked with the Department and identified their concerns.

**Opponents' Testimony: None**

**Questions from Committee Members and Responses:**

**SEN. BRENT CROMLEY** asked whether the term "project" had been defined. **Mr. Reardon** explained that the Transportation Commission selects "projects" for construction and reconstruction based on recommendations of the MDOT. The term appears in the code.

**SEN. CROMLEY** asked for more clarification in regard to two-thirds of the parcels. He questioned whether this involved an acreage basis or a number of tracts of land. **Mr. Reardon** stated that this would involve separate pieces of property that are recorded as such. They had considered using total acreage. If there were five parcels on a project, four of the parcels could be one acre parcels while one could be a 200 acre parcel. If the 200 acre parcel was obtained, the other four landowners of the one-acre parcels may be treated unfairly. A single owner might have ten parcels.

**SEN. CROMLEY** questioned the alternative if the court did not rule within the time periods set out in the bill. **Mr. Reardon** stated that the largest problem was the Department's inability to get the landowners to the courthouse.

**SEN. JERRY O'NEIL** claimed the Legislature could not tell the court when a hearing was to be held. **Mr. Reardon** explained that he was understanding of the present caseload in the court system. The process is already in place for the court to have a hearing. There is a recommendation of six months. The parameters of when the hearing must take place is what is lacking.

**SEN. MIKE WHEAT** noted that in regard to possession, on page 2, line 15, the term possession would involve the final order. **Mr. Reardon** affirmed and noted that this language is currently found in 70-30-311.

**SEN. WHEAT** asked whether the landowner could be put on notice when the complaint was filed. This would give the court a little more time. **Mr. Reardon** stated this was a worthwhile proposal. Their experience has been that by the time the Department files the complaint, the landowner and the Department have already reached the impasse. After the service of the complaint, a 30 day window is provided in which the estimated fair market value is deposited. Notice is provided to the landowner with the deposit. At that time, the filing for the motion for the hearing would be made.

**SEN. WHEAT** remarked that even though the presumption would be in place, the court would still need to hear evidence from the

landowner if they believed they had sufficient evidence to override the presumption. This involves an evidentiary hearing. He questioned whether briefs would be filed with the motions to request a hearing. **Mr. Reardon** affirmed the motion would be filed with a brief and an attached affidavit from their engineer. An objection should be responded to in the same way.

**SEN. JEFF MANGAN** raised a concern about other groups that may want to be included in this type of legislation. **Mr. Reardon** stated historically the Legislature and the courts have been pretty clear in dividing that line in terms of public interest brought by the government versus public interest brought by the mining companies.

**SEN. WHEAT** asked how the bill would affect attempts to acquire right-of-ways across the Indian Reservations. **Mr. Reardon** stated that in regard to land owned by Indian Tribes, they would use the federal court system. Historically, this has not been necessary. The federal court would apply Montana law.

*{Tape: 2; Side: A}*

**CHAIRMAN GRIMES** noted that it had been stated that the current delays involved attempts to leverage a better price. Technical design issues also caused some of the delays. There seemed to be various other ways to address the same issues presented. **Mr. Reardon** stated that on occasion there is a design issue should be handled in house. This addresses many of the issues involved with necessity. It doesn't address the frustration of trying to get the issue in front of a judge. If there are one or two landowners holding out, there is no other mechanism to use other than giving the landowner what they want. At times, they make design changes that are not meeting the engineering standards.

**SEN. GARY PERRY** questioned how many appraisals were obtained for a parcel. **Mr. Reardon** explained that one appraisal was used. The Department would use either an in-house appraiser or a contracted appraiser. If there is an issue of value, the landowner can, and often will hire his or her own appraiser. If there is a dispute over the Department's appraisal, they may ask the property owner to select someone from their list. If this is a value issue, most landowners will hire an attorney as well as an appraiser.

**SEN. PERRY** questioned whether there was a plus or minus figure which the Department would be allowed to negotiate. **Mr. Reardon** affirmed that their field agents had the discretion of using a percentage above or below the appraisal price. The district administrators have a little more leeway for an administrative

settlement. His office has additional authority for administrative settlement.

**SEN. PERRY** asked whether this would be a percentage or a dollar amount. **Mr. Reardon** stated that field agents were recently given an additional \$5,000 of authority. The district administration would have an additional \$10,000 of authority. This information will be provided for the Committee.

**CHAIRMAN GRIMES** asked **Mr. Bloomquist** whether they had concerns in regard to legitimate necessity issues which might need to be addressed. **Mr. Bloomquist** noted that the list in Title 70 in regard to condemnation is fairly extensive in regard to condemnation in regard to property being taken for public purposes. Even though there has been some recent work in regard to eminent domain laws in Montana, the list is also archaic to a certain degree. The Department is dealing with their particular issue by keeping this in Title 60.

**CHAIRMAN GRIMES** stated that if one-third of the landowners were holding out, there may be some issues. **Mr. Bloomquist** stated that the Association was in support of the bill. His issue is the time frame involved for the landowner.

**CHAIRMAN GRIMES** questioned whether the notice was sufficient. **Mr. Bloomquist** stated that the Department would be communicating with the landowner. They would inform the landowner in regard to the process available.

**Director Galt** stated that by the time the issue would center on the right-of-way, there has been an open public meeting process where every landowner has been identified. Prior to this an environmental document would have been prepared which would have included additional notice and meetings as well as discussion of alternatives. The Department provides the landowners with a brochure outlining the process.

**SEN. MANGAN** asked whether there would be any negative consequences to the landowner. He further asked the situation in regard to attorneys fees. **Mr. Reardon** stated that the landowner would pay his or her attorney fees unless they succeeded in the dispute over the right-of-way acquisition.

**SEN. WHEAT** stated that in regard to possession, the court was dealing with a final order. He questioned whether an injunctive hearing could be used which would rely upon the rules set forth



in the statute in regard to injunctive relief. **Mr. Reardon** maintained that he did not know which approach would be less threatening to a property owner.

**SEN. CROMLEY** noted that the language on page 2, (4)(b), addressed the deposit made by the Department. He questioned whether the payment was made in any condemnation case that was disputed. **Mr. Reardon** stated that it would be in the case of a contested hearing on the issue of necessity and they would be asking the court to place them in possession of the property.

**SEN. AUBYN CURTISS** asked whether it was the policy of the Department to acquire the smallest amount of land needed for the construction project. **Mr. Reardon** claimed that by law they are required to take the property that will do the least private harm.

**SEN. CURTISS** questioned whether there was a ratio of land necessary to be acquired for wetlands in connection with the purchase. **Mr. Reardon** explained that every acre of a wetland disturbed would need to be replaced within the same watershed. They do purchase land specifically for wetland purposes. **Mr. Galt** added the Department did not condemn land for wetland mitigation. They work with landowners across the state to develop the mitigation projects to offset their impacts.

**Closing by Sponsor:**

**SEN. BARKUS** offered a potential amendment to increase the two-thirds percentage to 75 percent, if this met with the Committee's approval. This legislation will result in better highways. It will save taxpayer dollars and eventually save human lives.

**ADJOURNMENT**

Adjournment: 11:15 A.M.

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SEN. DUANE GRIMES, Chairman

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JUDY KEINTZ, Secretary

DG/JK

**EXHIBIT (jus11aad)**